[illegible] 25 to 2
[illegible] Gordon
10 to 12

Clifford J.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~362.~~ 160

THE SCHUYLKILL AND DAUPHIN IMPROVEMENT AND RAILROAD COMPANY, THE BEAR MOUNTAIN FRANKLIN COAL COMPANY, ET AL., PLAINTIFFS IN ERROR,

VS.

SAMUEL A. MUNSON, AND JAMES WATSON WILLIAMS, AND HELEN E. M. WILLIAMS, HIS WIFE. Plffs below

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

[illegible] Penn Land case

FILED DECEMBER 9, 1870.

April 14. 1872
affirmed
Mr Clifford

SUPREME COURT OF THE UNITED STATES.

No. 362.

THE SCHULYKILL AND DAUPHIN IMPROVEMENT AND RAILROAD COMPANY, THE BEAR MOUNTAIN FRANKLIN COAL COMPANY, ET AL., PLAINTIFFS IN ERROR,

VS.

SAMUEL A. MUNSON, AND JAMES WATSON WILLIAMS, AND HELEN E. M. WILLIAMS, HIS WIFE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Docket entries	1	1
Summons	5	2
Averment	6	4
Order for judgment	7	4
Judgment	8	4
Pleas	8	5
Jury	10	5
Verdict	11	6
Judgment	12	6
Bill of exceptions	13	6
Map	20	8
Map	25	10
Map	31	13
Map	36	15
Map	39	16
Citation	42	18
Writ of error	43	18
Certificate	44	19
Assignment of errors	45	19

1. James Quinn; 2. Samuel Sparhawk; 3. John L. Hadden; 4. Henry Myers; 5. John M. Chestnut; 6. Charles H. Thaw; 7. Jacob Snare; 8. William E. Tenbrook; 9. William W. Adams; 10. Charles C. Chase; 11. Andrew H. Tippen; 12. Julius C. Sterling.

And now April 27th, 1869, the jurors aforesaid, on their oaths aforesaid, do say that they find for the plaintiffs with costs of suit.

" May 3. Pl'ff's bill of costs filed.
" " " Judgment on the verdict.
" " " Bill of exceptions filed.
" June 9. Hab. fac. poss. issued.
" August 24. Hab. fac. poss. returned, delivered possession, &c.
" April 29. Bonds on appeal approved, &c.
" " " Citation issued.
" " " Writ of error issued.
1870, October 14. Citation returned; service accepted.

Summons in ejectment.

3 In the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit.—October sessions, 1865.

SAMUEL A. MUNSON AND JAMES WATSON WILLIAMS, and Helen E. M. Williams, his wife, in right of the said Helen E. M. Williams, all citizens of the State of New York,

vs.

THE SCHUYLKILL AND DAUPHIN IMPROVEMENT and Railroad Company, The Bear Mountain Franklin Coal Company, and The Broad Mountain Mammoth Vein Coal Company, all corporations chartered under the laws of the State of Pennsylvania, and citizens of that State, and Henry Schmoele, William J. Schmoele, and Henry J. Osterman, all citizens of the State of Pennsylvania.

No. 17.

Pleas before the honorable the judges of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit. Of October sessions, 1865, No. 17.

It is thus contained:

4 Be it remembered that heretofore, to wit, on the seventh day of February, 1866, Samuel A. Munson, James Watson Williams, and Helen E. M. Williams, by their attorney, Franklin B. Gowen, esquire, sue out of said court their writ of summons in ejectment, which said writ is in the words and figures following, to wit:

[50-ct. U. S. rev. stamp.]

3* UNITED STATES,
Eastern District of Pennsylvania, sct:

{ SEAL OF C. C. U. S. } The President of the United States to the marshal of the eastern district of Pennsylvania, greeting:

We command you that you summon The Schuylkill and Dauphin Improvement and Railroad Company, The Bear Mountain Franklin Coal Company, and The Broad Mountain Mammoth Vein Coal Company, all corporations chartered under the laws of the State of Pennsylvania and citizens of that State, and Henry Schmoele, William J. Schmoele, and Henry J. Osterman, all citizens of the State of Pennsylvania, late of your district, if they may be found therein, so that they be and appear before the judges of the circuit court of the United States, in and for the eastern district of Pennsylvania, in the third circuit, at a session of the same court, to be holden at Philadelphia, on the first Monday of March next, then and there to answer to a certain complaint made by Samuel A. Munson and James Watson Williams, and Helen E. M. Williams, his wife, in right of said Helen E. M. Williams, all citizens of the State of New York, that the said defendants, now have in their actual possession all that certain tract or parcel of land situate in Porter Township, Schuylkill County, in the eastern district of Pennsylvania, bounded by lands in the warrantee names of William Graeff, Philip Zimmerman and others, surveyed on a warrant dated the fourteenth day of December, A. D. 1829, granted by the Commonwealth of Pennsylvania to Benjamin Bonawitz, and containing sixty-six acres, one hundred and thirty perches and allowance, the right of possession or title to which they, the said plaintiffs, say is in them and not in the said defendants. All which they, the said plaintiffs, aver they are prepared to prove before our said court. Hereof fail not. And have you then there this writ.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Philadelphia, this seventh day of February, A. D. 1866, and in the ninetieth year of the independence of the United States.

W. GRIER HIBLER,
Pro. Clerk of Circuit Court U. S.

5 Which said writ is endorsed as follows:

No. 17. Circuit court, U. S. October Sess. 1865. Samuel A. Munson et al. vs. The Schuylkill and Dauphin Improvement and Railroad Co., et al. Summons in ejectment. Returnable on the first Monday of March next. Franklin B. Gowen, attorney for plaintiffs. $2 90. Filed March 5, 1866.

February 20th, 1866, served the within writ personally on George K. Tryon, the secretary of the Schuylkill and Dauphin Improvement and Railroad Company, and on Henry Schmoele, as defendant and as treasurer of the Bear Mountain Franklin Coal Company, and the Broad Mountain Mammoth Vein Coal Company, and on William J. Schmoele and Henry J. Osterman, by exhibiting the same to each of them, and by making known the contents thereof to each of them respectively, and leaving with each a true and attested copy. So answers.

THO'S S. CRUMBARGAR,
Dep'y Marshal.

6 And thereupon afterwards, to wit, on the twenty-ninth day of August, A. D. 1866, Franklin B. Gowen, esq., plaintiffs' attorney, presents an averment of citizenship of plaintiffs and defendants, which is filed in the words and figures following, to wit:

C. C. U. S., Oct. Sess., 1865.

MUNSON ET AL.
vs.
THE SCH'LL & DAUPHIN IMP'T & R. R. CO., ET AL. } No. 17.

The plaintiffs hereby aver that Samuel A. Munson, James Watson Williams, and Helen E. M. Williams, are citizens of the State of New York; and they further aver that the corporations defendant, The Schuylkill and Dauphin Improvement and Railroad Co., The Bear Mountain Franklin Coal Company, and The Broad Mountain Mammoth Vein Coal Co., are each a body corporate by the act of the general assembly of the Commonwealth of Pennsylvania; that each has its principal place of business in that State, and that each is a citizen of the State of Pennsylvania; and they also aver that Henry Schmoele, W'm J. Schmoele & Henry J. Osterman, are citizens of the State of Pennsylvania.

FRANKLIN B. GOWEN,
Plaintiff's Attorney.
P'r J. W. SLOAN.

To Hon. B. PATTON, *Cl'k C. C. U. S.*

7 Which said averment is endorsed as follows:

17. Oct. Sess., 1865. C. C. U. S. Munson vs. The Sch'll & D. Imp't Co. et al. Averment of citizenship of pl'ff's & def't. Filed August 29, 1866.

And thereupon afterwards, to wit, on the thirty-first day of August, 1866, an order for judgment for want of an appearance is presented by plaintiff's attorney, which being filed, is in the words and figures following, to wit:

C. C. U. S., Oct. Sess., 1865.

MUNSON ET AL.
vs.
THE SCH'LL & DAUPHIN IMP'T & R. R. CO., ET AL. } No. 17.

Please enter judgment against The Bear Mountain Franklin Coal Co., and The Broad Mountain Mammoth Vein Coal Co., defendants in the above suit for want of an appearance.

Aug. 30, 1866.

FRANKLIN B. GOWEN,
Plaintiff's Attorney.
P'r J. H. SLOAN.

To Hon. B. PATTON, *Cl'k.*

8 Which said order is endorsed as follows:

17. Oct. Sess., '65. C. C. U. S. Munson et al. vs. The S. & D. Imp. Co. et al. Order for judgment. Filed August 31, 1866.

Whereupon the court orders judgment accordingly.

And thereupon afterwards, to wit, on the thirteenth day of September, A. D. 1866, F. W. Hughes & Sharpless, esquires, attorneys for defendants, The Schuylkill & Dauphin Improvement and Railroad Company, present their plea, which is filed, in the words and figures following, to wit:

C. C. U. S., E. dist., Pa., Oct. Sess., 1865.

MUNSON ET AL.
vs. } No. 17.
THE SCHUYLKILL & D. IMP'T & R. R. CO. ET AL.

9 The defendants "The Schuylkill & Dauphin Imp't & R. R. Co.' plead "not guilty."

F. W. HUGHES & SHARPLESS,
Att'ys for S. & D. R. R. Co.

To Hon. Judge PATTON, *Clerk, &c., &c.*

Which said plea is endorsed as follows:
17. Oct. sess. 1865. E. dist. Pa. Munson et al. vs. The Schy'll & D. Imp't & R. R. Co. et al. C. C. U. S. Plea of The Schy'll & D. Imp. & R. R. Co. Filed September 13, 1866. F. W. Hughes. Sharpless.

And thereupon afterwards, to wit, on the 6th day of October, A. D. 1866, Charles E. Lex, esqure, presents plea of defendants, Henry & William J. Schmoele and Henry J. Osterman, which is filed in the words and figures following, to wit:

Circuit court U. S., Oct. sess., 1865.

SAMUEL A. MUNSON ET AL.
vs. } No. 17.
THE SCHUYLKILL & DAUPHIN IMPROVEMENT & Railroad Co.

10 Defendants, Henry & William J. Schmoele, and Henry J. Osterman plead not guilty.

CHA'S E. LEX,
For Defendants above named.

OCT. 6, 1866.

Which said plea is endorsed as follows:
17. Oct. sess., 1865. C. C. U. S. Munson vs. The Schuylkill & Dauphin Improvement Co. Plea of Henry & William J. Schmoele, & Henry J. Osterman. Filed 10 October, 1866.

Therefore let a jury thereupon come before the judges aforesaid on the
twenty-seventh day of April, A. D. 1869, by whom the truth of the matter
may be better known, to recognise upon their oath whether the said defend-
ants, The Schuylkill and Dauphin Improvement and Railroad Company,
and Henry Schmoele, William J. Schmoele, and Henry J. Oster-
11 man be guilty or not guilty, because as well the said Samuel A.
Munson and James Watson Williams, and Helen E. M. Williams,
his wife, in right of the said Helen E. M. Williams, plaintiffs, as the
said The Schuylkill and Dauphin Improvement and Railroad Company,
and Henry Schmoele, William J. Schmoele, and Henry J. Osterman,
defendants, have put themselves upon the said jury.

On which said twenty-seventh day of April, A. D. 1869, came the parties aforesaid by their attornies aforesaid, and the jurors of the jury aforesaid for this purpose empanelled and returned, to wit:

1. James Quinn; 2, Samuel Sparhawk; 3, John L. Hadden; 4, Henry Myers; 5, John M. Chestnut; 6, Charles H. Thaw; 7, Jacob Snare; 8, William E. Tenbrook; 9, William W. Adams; 10, Charles C. Chase; 11, Andrew H. Tippen; 12, Julius C. Sterling; being called, come; who being elected, tried and sworn, or affirmed, to speak the truth of and concerning the premises, upon their oath do say that they find for the plaintiffs with cost of suit.

12 *Judgment.*

Thereupon it is considered by the court here that the said plaintiffs do recover against the said defendants the lands and premises described in their said writ, and also their said costs and charges on this behalf sustained, and the said defendants in mercy, &c.

13 And thereupon afterwards, to wit, on the third day of May, A. D. 1869, the defendants, by their attornies, come into court and present their bill of exceptions, which being filed is as follows, to wit:

Bill of exceptions.

Be it remembered, that in the term of October, A. D. 1865, came Samuel A. Munson and James Watson Williams, and Helen E. M. Williams, his wife, in right of the said Helen E. M. Williams, all citizens of the State of New York, into the circuit court of the United States, sitting in and for the eastern district of Pennsylvania, and there impleaded The Schuylkill and Dauphin Improvement and Railroad Company, and others, of the State of Pennsylvania, in a certain plea of ejectment, (pro-ut writ,) in which the said The Schuylkill and Dauphin Improvement and Railroad Company pleaded, (pro-ut plea,) and thereupon issue was joined between them.

14 And afterwards, to wit, on the 27th day of April, A. D. 1869, before the Honorable Judge John Cadwalader, of the said court, the aforesaid issue came on to be tried by a jury of the said district for that purpose duly empanelled, and the said jurors being called come, &c., and upon the said trial the said plaintiff to maintain the issue on their part gave in evidence:

15 1. An application to the land office of the State of Pennsylvania, dated December 14th, 1829, made by one Benjamin Bonawitz, for 66 acres of unimproved land in Lower Mahantongo township, Schuylkill County, Pennsylvania, adjoining lands of John Huber on the north, Philip Zimmerman on the west, Hain and Graeff on the east, and William Parker on the south, (as follows:)

Application.

Benjamin Bonawitz, of Pinegrove Township, Schuylkill County, applies for sixty-six acres of unimproved land, situate in Lower Mahantango Township, Schuylkill County, adjoining lands of John Huber on the north, Philip Zimmerman on the west, Hain & Graeff on the east, and W'm Parker on the south.

BENJA'N BONAWITZ.

To the SECRETARY OF THE L'D OFFICE.

£ 10 p. c't. Int. from the date.

16 SCHUYLKILL COUNTY, *ss:*

Before us, the subscribers, two of the justices of the peace in and for said county, personally came Daniel Augst, a disinterested witness, who, upon his solemn oath doth depose and say that, to his certain knowledge, the land described in the above application is unimproved, and, as he verily believes, vacant and not heretofore claimed by any person or persons.

DANIEL AUGST.

Sworn and subscribed before us the 11th December, A. D. 1829.

HENRY W. CONRAD.
JACOB CRIST.

17 SCHUYLKILL COUNTY, *ss:*

Before me, the subscriber, one of the justices of the peace in and for said county, personally came Benjamin Bonawitz, the above-named applicant, who, upon his solemn oath, doth depose and say that to the best of his knowledge, no warrant or other office right has issued for the land described in the above application, either in his own name or in the name or names of any person or persons under whom he claims the same. And further saith not.

BENJA'N BONAWITZ.

Sworn and subscribed before me the 11th day of December, A. D. 1829.

HENRY W. CONRAD.

I do hereby certify that the foregoing is a true copy of an application, as taken from and compared with the original now remaining on file in the office of the surveyor general of Pennsylvania.

In testimony whereof I have hereunto set my hand and the seal of said office at Harrisburg, this sixteenth day of November, A. D. 1865.

{ SEAL OF SURVEYOR GENERAL'S OFFICE, PENN'A. } For JAMES P. BARR, S. G.

18 2. Warrant from the Commonwealth of Pennsylvania, dated December 14, A. D. 1869, to Benjamin Bonawitz, for the land described in the aforesaid application, (as follows:)

Warrant.

THE COMMONWEALTH OF PENNSYLVANIA, *ss:*

Whereas Benjamin Bonewitts, of the township of Pinegrove, county of Schuylkill, hath applied for sixty-six acres of land, being unimproved, adjoining land of John Huber on the north, Philip Zimmerman on the west, Hain & Graeff on the east, and William Parker on the south, situate in Lower Mahontongo township, in the county of Schuylkill, for which he hath paid into the office of the State treasurer, at the rate of ten pounds per hundred acres; interest thereon from the date hereof to be paid agreeably to the several acts of assembly in such case made and provided: These are, therefore, to authorize and require you to survey or cause to be surveyed unto the said Benjamin Bonewitts the quantity of acres by him applied for at the place afore-
19 said, if not already surveyed or appropriated, and to make

return thereof into the land office; for which this shall be your warrant.

In witness whereof Joshua Dickenson, secretary of the land office, hath hereunto set his hand and affixed the seal of the said office, the fourteenth day of December, A. D. 1829.

JOSHUA DICKERSON,
Secretary of the Land Office.

To GAB'L HIESTER, esq.,
Surveyor General.

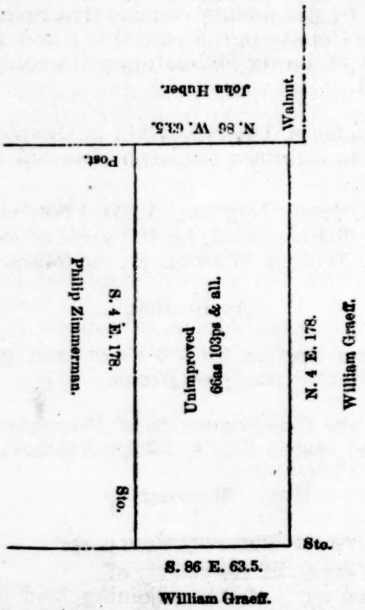
In testimony that the above is a copy of the original on file in the surveyor general's office, I have hereto set my hand and the seal of said office, at Harrisburg, the 16th day of Nov., 1865.

SEAL SURVEYOR
GENERAL'S OFFICE,
PENN'A.

For JAMES P. BARR,
Surveyor General.
THEO. J. REHRER.

(Endorsed:) 1829, Dec'r 14. Schuylkill, 66 a's. Benjamin Bonawitz. Copy 50 cts. 103.

20 3. Return of survey made by Frederick Landerbrun, deputy surveyor of Schuylkill County, in pursuance of the warrant aforesaid, on the 1st of June, A. D. 1829. Survey returned to the land office and accepted March 5th, A. D. 1830, (as follows:)



Situate in Lower Mahantongo Township, Schuylkill County, containing sixty-six acres and one hundred and three perches, and allowance of six per cent., returned this 3d day of March, 1830, in pursuance of a warrant dated the 14th day of December, 1829, granted to Benjamin Bonawitz.

The lines and corners of the above survey were made on the 18th day of June, 1829, in pursuance of a warrant dated the 17th day of March, 1829, granted the said Benjamin Bonawitz, a return on 21 which was made, but was rejected on account of the survey not answering the description of the warrant.

F. LANDERBRUN,
D. S. of Schuylkill Co.

To GABRIEL HIESTER, Esq.,
Surveyor Gen'l of Pa.

In testimony that the above is a copy of the original remaining on file in the office of the surveyor general of Pennsylvania, I have hereunto set my hand and affixed the seal of said office, at Harrisburg, this seventeenth day of November, 1865.

SEAL OF SURVEYOR GENERAL'S OFFICE, PENN'A.

For JAMES P. BARR,
Surveyor General.
THO. J. REHRER.

(Endorsed:) Schuylkill County. Benjamin Bonawitz. 66 a's 103 p's. Copy, 50 c'ts. 103. Accepted 5 Mar., 1830.

4. Sundry mesne conveyances from Benjamin Bonawitz to the 22 plaintiffs for the land described in the warrant, being the same described in the writ in this case, (pro-ut the same,) and also gave in evidence the writ in this case and the return thereof, (pro-ut the same,) and it was admitted by defendants' counsel that Schuylkill County was erected out of Berks County in the year 1811; and that Porter Township was created out of Lower Mahantongo Township in the year 1840. And plaintiffs rested.

And the said defendants, The Schuylkill & Dauphin Improvement & Railroad Company, to maintain the issue aforesaid on their part, gave in evidence—

1. An application, dated July 1st, A. D. 1793, made by one Jacob Yeager to the land office aforesaid, for 400 acres of land adjoining lands same day granted to William Witman, j'r, (as follows:)

Application.

Jacob Yeager applies for 400 a's of land granted to William 23 Witman, j'r, in the county of Berks.

2. Warrant from the Commonwealth of Pennsylvania to Jacob Yeager for the same land, dated July 1, 1793, (as follows:)

Warrant.

THE COMMONWEALTH OF PENNSYLVANIA, *ss:*

Whereas Jacob Yeager, of the county of   , hath requested to take up four hundred acres of land adjoining land this day granted to William Witman, ju'r, in the county of Berks, (provided the land is not within the last purchase made of the Indians,) for which he agrees to pay immediately into the office of the receiver general, for the use of this State, at the rate of fifty shillings per hundred acres in gold, silver, paper money of this State, or certificates, agreeably to an act of assembly passed the first day of April, 1784, and to an act passed the third day of April, 1792, entitled "An act for the sale of vacant lands within this Commonwealth." Interest to commence from the date hereof.

24 These are, therefore, to authorize and require you to survey, or cause to be surveyed, unto the said Jacob Yeager, at the place aforesaid, according to the method of townships appointed, the said quantity of acres, if not already surveyed or appropriated, and to make return thereof into the secretary's office in order for confirmation; for which this shall be your warrant.

In witness whereof, Thomas Mifflin, Governor of the said Commonwealth hath hereunto set his hand and caused the less seal of the said Commonwealth to be affixed the first day of July in the year 1793.

THO. MIFFLIN. [L. S.]

To DANIEL BROADHEAD, Esq.,
Surveyor General.

In testimony that the above is a copy of the original on file in the surveyor general's office, I have hereunto set my hand and the seal of said office at Harrisburg the twenty-sixth day of November, 1853.

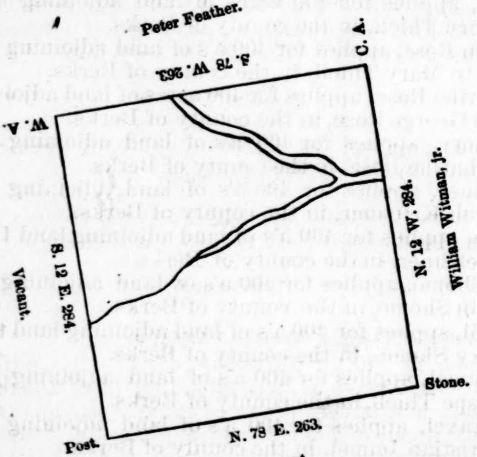
{ SEAL SURVEYOR GENERAL'S OFFICE, PENN'A. }

For J. PORTER BRAWLEY, *S. G.*
THO. J. REHRER.

(Endorsed:) 1793, July 1st. Berks. 400 a. Jacob Yeager. Rec'd, &c., 27 February, 1837.

The above endorsement was mad' on the 23 Nov. 1853.—No. 27.

25 3. Return of survey made on the warrant last mentioned by William Wheeler, j'r. deputy surveyor of Berks County, on the 10th day of July, A. D. 1794, of 440 acres 64 perches of land and allowance; situate in Pinegrove Township, in the county of Berks, returned to the land office and accepted August 26th, 1794.



In pursuance of a warrant dated the 1st day of July, 1793, surveyed the 10th day of July, 1794, unto Jacob Yerger, the above described tract of land, situate in Pinegrove Township, in the county of Berks, containing 440 a's & 64 p's, & the allowance of six per cent for roads, &c.

W'M WHEELER, *D. Sur.*

To DANIEL BRODHEAD, Esq.,
Surveyor General.

4. The defendant offered in evidence sundry conveyances tending (as alleged by them but not admitted by plaintiff) to deduce title to the said Jacob Yeager warrant and survey to the said defendant, The Schuylkill and Dauphin Improvement & Railroad Company—which Jacob Yeager warrant, as located and surveyed by William Wheeler, j'r, on the 10th day of July, 1794, includes the land embraced in the said Benjamin Bonawitz survey before-mentioned—including among the said conveyances a patent from the Commonwealth of Pennsylvania, dated 27th February, 1837, to Charles A. Snyder and Andrew J. Jones for the said Jacob Yeager tract. (Pro-ut the same.)

26 And the said defendant rested.

And the said plaintiff to maintain the issue aforesaid, in rebuttal gave in evidence:

1. Certified copy of 18 applications all dated July 1st, A. D. 1793, for 400 acres each, the leading one being in the name of one James Silliman, and one of the eighteen being the application by Jacob Yeager given in evidence by the defendants, as follows:

James Silleyman, applies for 400 acres of land on the north side of Mahonoy mountain adjoining or near land surveyed to David Rees, supposed to be in the county of Berks.

Susanna Silleyman, applies for 400 acres of land adjoining or near land surveyed to Isaac Pearson & adjoining land this day granted to James Silleyman, in the county of Berks.

Henry Thiell, applies for 400 acres of land adjoining land this day granted to Susanna Silleyman, in the county of Berks.

Mary Thiell, applies for 400 acres of land adjoining land this day granted to Henry Thiell, in the county of Berks.

George Rose, applies for 400 a's of land adjoining land this day
27 granted to Mary Thiell, in the county of Berks.

Catharine Rose, applies for 400 acres of land adjoining land this day granted to George Rose, in the county of Berks.

Jacob Kelchner, applies for 400 a's of land adjoining land this day granted to Catharine Rose, in the county of Berks.

Maria Kelchner, applies for 400 a's of land, adjoining land this day granted to Jacob Kelchner, in the county of Berks.

John Shomo, applies for 400 a's of land adjoining land this day granted to Maria Kelchner, in the county of Berks.

Ann Mary Shomo, applies for 400 a's of land adjoining land this day granted to John Shomo, in the county of Berks.

Casper Thiell, applies for 400 a's of land adjoining land this day granted to Ann Mary Shomo, in the county of Berks.

Christian Immel, applies for 400 a's of land adjoining land this day granted to Caspe Thiell, in the county of Berks.

Christian Traxel, applies for 400 a's of land adjoining land this day granted to Christian Immel, in the county of Berks.

John Klinger, applies for 400 a's of land adjoining land this day granted to Christian Traxel, in the county of Berks.

John Witman, applies for 400 a's of land adjoining land this day granted to John Klinger, in the county of Berks.

28 Mary Whitman applies for 400 acres of land adjoining land this day granted to John Witman, in the county of Berks.

William Witman, jun'r, applies for 400 a's of land adjoining land this day granted to Mary Witman, in the countyof Berks.

Jacob Yeger applies for 400 a's of land adjoining land this day granted to William Witman, j'r, in the county of Berks.

BERKS COUNTY, *ss :*

We, the subscribers, two of the justices of the peace in and for said county, do certify that from the best information we have been able to obtain we are of opinion that the foregoing described eighteen tracts of land are yet vacant and unimproved.

Given under our hands the 11th May, 1793.

MATTHIAS RICHARDS.
PETER NAGLE.

The foregoing lots issued, 50*s.* p'r c't.

I do hereby certify that the above and foregoing are true copies taken from the original applications remaining on file in the office of the surveyor general of Pennsylvania.

{ SEAL OF SURVEYOR GENERAL'S OFFICE, PENN'A. } In testimony whereof I have hereunto set my hand and affixed the seal of said office this 14th day of January, 1847.

For JOHN LAPORTES, *S. G.*
R. M. CRAIN.

(Endorsed:) 1st July, 1793. Silleyman, Thiell, Rose, Kelchner, Shomo, Immel, Traxel, Klinger, Witman, and Yeger, Berks Co. Fees, $\frac{75}{100}$ d.

29 And proved payment of the purchase money to the Commonwealth.

2. Certified copies of 18 descriptive warrants issued upon the above eighteen applications, including the warrant to Jacob Yeager given in evidence by the defendants, as follows:

Warrant.

THE COMMONWEALTH OF PENNSYLVANIA, *ss :*

Whereas Jacob Yeager of the county of hath requested to take up four hundred acres of land adjoining land this day granted to William Witman, ju'r, in the county of Berks, (provided the land is not within the last purchase made of the Indians,) for which he agrees to pay, immediately, into the office of the receiver general, for the use of this State at the rate of fifty shillings per hundred acres, in gold, silver, paper money of this State, or certificates, agreeably to an act of assembly passed the first day of April, 1784, and to an act passed the
30 third day of April, 1792, entitled "An act for the sale of vacant lands within this Commonwealth." Interest to commence from the date hereof. These are therefore to authorize and require you to survey, or cause to be surveyed, unto the said Jacob Yeager at the place aforesaid, according to the method of townships appointed, the said quantity of acres, if not already surveyed or appropriated, and to make return thereof into the secretary's office in order for confirmation, for which this shall be your warrant.

In witness whereof, Thomas Mifflin, governor of the said Commonwealth hath hereunto set his hand and caused the less seal of the said Commonwealth to be affixed the first day of July, in the year 1793.

THO. MIFFLIN, [L. S.]

To DANIEL BROADHEAD, Esq.,
Surveyor General.

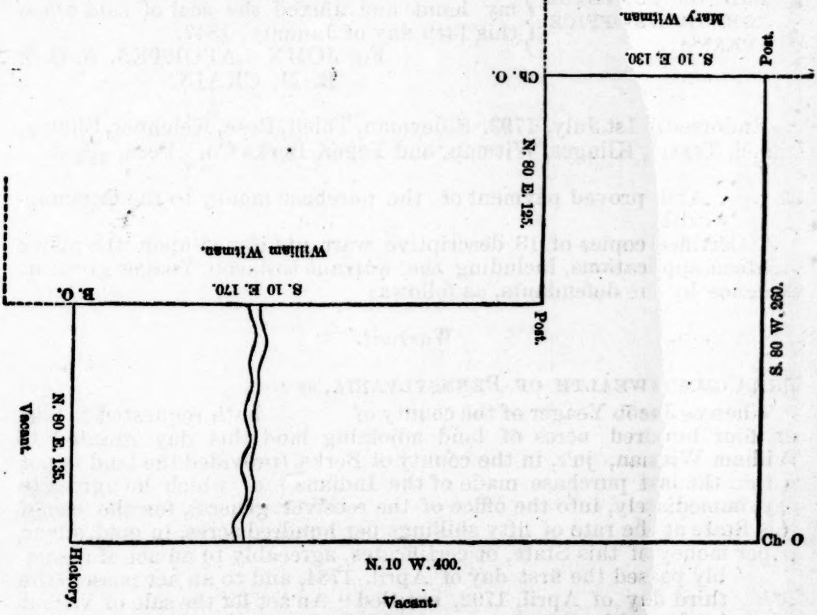
{ SEAL OF SURVEYOR GEN'L OFFICE PENN'A. } In testimony that the above is a copy of the original on file in the surveyor general's office, I have hereunto set my hand and the seal of said office, at Harrisburg, the twenty-sixth day of November, 1853.

For J. PORTER BRAWLEY, *S. G.*
THO. J. REHRER.

31 (Endorsed:) 1793, July 1st. Berks. 400 a. Jacob Yeager. Ret'd &c., 27 February, 1837.

The above indorsement was made on the 23 Nov., 1853. No. 27.

3. Certified copies of eighteen surveys made by Henry Vanderslice, deputy surveyor of Berks County, upon the above eighteen warrants, according to the descriptions of the warrants, including the Jacob Yeager tract, as follows:



32 By virtue of a warrant dated first day of July, 1793, and surveyed the 11th day of the same month and year to Jacob Yeager the above described tract of land, situate on branches of Catawissey on the north side of Mahonoy Mountain containing four hundred and fourteen acres and 33 perches and allowance of six per cent.

HENRY VANDERSLICE.

To DANIEL BROADHEAD, Esq., *Surveyor General.*

In testimony that the above is a copy of the original on file in the surveyor general's office I have hereto set my hand and the seal of said office, at Harrisburg, the 6th day of December, 1853.

{ SEAL OF
SURVEYOR GENL'S
OFFICE, PA. }

For J. PORTER BRAWLEY, *S. G.*
THO. J. REHRER.

(Endorsed:) Berks. Jacob Yeager. 414 a. 33 p.

Another return on this same warrant made by W'm Wheeler, D. S., and ret'd & 27th Feb'y, 1837.

4. Return and acceptance of the above eighteen surveys made by Henry Vanderslice on July 16th, 1793, as follows:

(53.)

33 *Henry Vanderslice, d'y surv'r's list of returns.*

1793.		*A's.*	*P's.*
July 16	*Henry Thiell	408	153
" "	George Rose	333	
" "	Susanna Silleyman	400	145
" "	James Silleyman	400	145
" "	Caspar Thiell	400	145
" "	Christian Immel	400	145
" "	Christian Troxel	422	
" "	John Klinger	402	†
" "	John Witman	402	27
" "	Mary Witman	402	27
" "	Jacob Yeger	414	33
" "	Henry Thiell	416	137
" "	Catharina Rose	400	145
" "	Jacob Kelchner	400	145
" "	Maria Kelchner	400	145
" "	Ann Mary Shomo	401	95
" "	W'm Witman	434	113

*This should be Mary Thiell
†Should be 402 a. 27 p.

(54.)

Henry Vanderslice's list of returns cont'd.

1793.		*A's.*	*P's.*
July 16	John Shomo	400	155

In testimony that the above are copies of eighteen entries made on pages 53 & 54 of book "Second Letter F," containing the list of returns of surveys made by deputy surveyors and now remaining in the office of the surv'r gen'l of Penn'a, I have hereto set my hand & the seal of said office, at Harrisburg, this 6th day of December, 1843.

{ SEAL OF
SURVEY'R GEN'L
OFFICE, PA. }

For J. PORTER BRAWLEY, *S. G.*
THO. J. REHRER.

34 Certified copy of caveat entered July 18, 1793, by John Kunckle and Aaron Bowen, against granting patents to the said Jacob Yeager and the remaining seventeen warrantees of the above-mentioned eighteen, as follows:

Caveat.

JULY 18TH, 1793.

John Kunckel and Aaron Bowen enter a caveat against granting patents to the following persons, viz: James Sillamon, Susanna Sillamon, Henry Thiell, Mary Thiell, George Rose, Catherine Rose, Jacob Kelchner, Mary Kelchner, John Shomo, Ann Mary Shomo, Caspur Thiell, Christian Immel, Christian Traxel, John Klinger, John Witman, Mary Witman, William Witman, jun'r, and Jacob Yeager, for lands situate in Catawissey Valley, Northumberland or Berks County, granted them by warrants dated first July last—the said Kunckel and Bowen alleging that they have warrants dated 19th May, 1792, in the names of Charles Shoemaker, George Raver, George Raver, jun'r, George Miller, jun'r, and Henry Noacer, for a part of the same land.

DAVID KENNEDY,
Sec'y Land Office.

35 I do hereby certify that the above is a true copy of a caveat as recorded in Caveat Book No. 8, page 87, remaining in the office of the surveyor gen'l of Penn'a.

In testimony whereof I have hereunto set my hand and affixed the seal of said office, this 20th day of April, 1847.

{ SEAL SURVEYOR GENERAL'S OFFICE, PENN'A. }

For JOHN LAPORTE, *S. G.*
THO. J. REHRER.

5. Certificate from the surveyor general's office that no proceedings had ever been had upon the said caveat, as follows:

SURVEYOR GENERAL'S OFFICE, PENN'A.

I do hereby certify that I have made diligent and careful search in this department for proceedings on the foregoing or within mentioned caveat, and do not find that any citation was ever applied for, or that any proceedings or action was ever had by the board of property upon or concerning the caveat, a copy of which is given within or 36 above as recorded in Caveat Book No. 8, page 87, remaining in the office of the surveyor general.

In testimony whereof I have hereunto set my hand and affixed the seal of said office at Harrisburg, this 20th day of July, A. D. 1867.

{ SEAL SURVEYOR GENL'S OFFICE, PENN'A }

J. M. CAMPBELL, *Sur. Gen'l.*
Per ROB'T A. McCOY, *Ch'f Cl'k.*

6. And the said plaintiffs offered in evidence a map showing the two locations of the said Jacob Yeager tract, the first made by Henry Vanderslice, and the second made by William Wheeler, as follows:

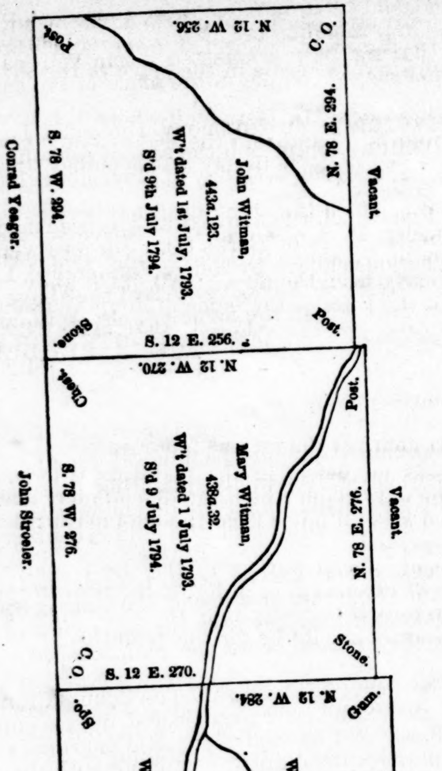
(Here follows map, marked page 36.)

38 7. And the counsel on both sides admitted that Henry Vanderslice was the deputy surveyor of Berks County, and that the location of the said Jacob Yeager tract, as made by him, was made in the county of Northumberland, within one mile of the line between that county and Berks County; and further, that the second location of the said warrant by William Wheeler was made in Berks County, about twenty-two miles distant from the survey made by Vanderslice.

And the plaintiffs closed.

And the said defendants, further to maintain the issue on their part, offered in evidence—

Certified copies of returns of surveys made by William Wheeler, on the 10th of July, A. D. 1794, upon the said Jacob Yeager warrant, and upon three others of the aforesaid eighteen warrants returned and accepted upon the 26th of August, A. D. 1794, as follows:


N. 12 W. 256.
C.O.
Post.
N. 78 E. 294.
Vacant.
John Witman,
443a.123.
W't dated 1st July, 1793.
S'd 9th July 1794.
S. 78 W. 294.
Conrad Yeager.
Post.
Stone.
S. 12 E. 256.
N. 12 W. 270.
Chest.
Post.
Vacant.
N. 78 E. 276.
Mary Witman,
438a.32.
W't dated 1 July 1793.
S'd 9 July 1794.
S. 78 W. 276.
John Stroeler.
Stone.
C.O.
S. 12 E. 270.
N. 12 W. 284.
Gum.
Spo.
William Witman, jur.
440a.64.
N. 78 E. 263.
Vacant.
W't dated 1 July 1793.
S'd 10th July 1794.
S. 78 W. 263.
Jacob Bower.
Stone.
C.O.
S. 12 E. 284.
N. 12 W. 284.
Stone.
C.O.
Jacob Yeager,
440a.64.
N. 78 E. 263.
Vacant.
W't dated 1st July 1793.
S'd 10th July, 1794.
S. 78 W. 263.
Peter Feather.
W.O.
Post.
S. 12 E. 284.
Vacant.

39 A connected draft of four tracts of land, situate in Schuylkill County, warrants bearing date, and surveyed respectively as above stated, having been connected from, and carefully compared with, the original surveys on file in the office of the surveyor general of Penn'a.

{ SEAL OF SURVEYOR GENERAL'S OFFICE, PENN'A. } In testimony whereof, I have hereto set my hand and the seal of said office, at Harrisburg, the 30th day of November, 1853.

The surveys from which the above draft has been made, were returned by William Wheeler, D. S. of Berks Co. Surveys were returned on all the warrants mentioned above by Henry Vanderslice, D. S. of Berks Co., & located differently from the above. All of the above tracts have been patented, except the tract in the name of John Witman.

For J. PORTER BRAWLEY, S. G.
THO. J. REHRER.

40 Both parties close.

And the court charged the jury as follows:

"The court sees no defect in the plaintiffs' title under this warrant and survey. The only claim which the defendants have set up, is under warrants located several miles from the land in controversy, by surveys returned and accepted.

"No subsequent official survey of this land, under these warrants, without a warrant of survey, or order of the board of property, was authorized. Therefore, if the jury take the same view of the evidence as the court, the verdict should be for the plaintiffs."

Whereupon the counsel for the said The Schuylkill and Dauphin Improvement and Railroad Company, objected and excepted to so much of the foregoing charge and opinion of the said court as is contained in the
last two paragraphs thereof, beginning with the words "no sub-
41 sequent official survey," &c., and inasmuch as the said charge and
opinion so excepted to do not appear of record, the counsel for
for the said The Schuylkill and Dauphin Improvement and Railroad Company did then and there tender this bill of exceptions to the learned judge aforesaid, requesting him to seal the same in accordance with the statute in such case made and provided. Whereupon the learned judge aforesaid, at the request aforesaid, put his hand and seal to this bill of exceptions this twenty-seventh day of April, A. D. 1869.

JOHN CADWALADER, *Judge.*

Which said bill of exceptions is endorsed as follows:

No. 17. October, 1865. Ejectment. Munson et al. vs. The Sch'y'll & D. Imp. & R. R. Co., C. C. U. S. Bill of exceptions. Exp. def'ts.

The within bill is satisfactory to me.

F. B. GOWEN,
For Pl'ff.

Filed 3 May, 1869.

42 *Citation.*

UNITED STATES,
Eastern District of Pennsylvania, sct.:

{ SEAL OF C. C. U. S. E. D. OF PA. } To Samuel A. Munson and James Watson Williams, and Helen E. M. Williams, his wife, in right of the said Helen E. M. Williams, all citizens of the State of New York.

Whereas by a writ of error issuing out of the Supreme Court of the United States directed to the judge of the circuit court of the United States, holden in and for the eastern district of Pennsylvania in the third circuit, wherein the said judges are directed to send the record and process of a certain suit with all things concerning them, so that the same may be had before the justices of the Supreme Court of the United States on the first Monday of December next, at the , in which suit The Schuylkill and Dauphin Improvement and Railroad Company, the Bear Mountain and Franklin Coal Company, and the Broad Mountain Mammoth Vien Coal Company, all corporations chartered under the laws of the State of Pennsylvania and citizens of that State, and Henry Schmoele, William J. Schmoele, and Henry J. Osterman, all citizens of the State of Pennsylvania, were the original defendants below, and you, the said Samuel A. Munson, and James Watson Williams, and Helen E. M. Williams, his wife, were the plaintiffs below, in a plea of ejectment; that the record and process aforesaid being inspected they, the said justices of the Supreme Court of the United States, may cause to be done thereupon what of right ought to be done, and the said plaintiffs in error having made an assignment of errors and given good and sufficient security that the plaintiffs in error shall well and truly prosecute their said writ of error to effect, and answer all such costs as upon an affirmance of the judgment of the said circuit court may be adjudged to the defendant in error: You are hereby cited to appear (if you see cause) at the said Supreme Court of the U. S. at the time and place aforesaid, to answer to the said writ of error and the errors assigned by the said plaintiffs in error.

Given under my hand and seal this twenty-ninth day of April, one thousand eight hundred and seventy.

JOHN CADWALADER, [SEAL.]
Judge.

I hereby accept service of the within citation, as attorney for the defendants in error. Phil'a, April 29, A. D. 1870.

FRANKLIN B. GOWEN,
PR. T. H., J'R.

43 *Writ of error.*

UNITED STATES,
Eastern District of Pennsylvania, sct.:

The President of the United States to the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, greeting:

Because, that in the record and process, and also in the rendering of judgment in a suit before you, between Samuel A. Munson, and James Watson Williams, and Helen E. M. Williams, his wife, in right of the said Helen E. M. Williams, all citizens of the State of New York, plaintiffs, and The Schuylkill and Dauphin Improvement and Railroad Company, the Bear Mountain Franklin Coal Company, and the Broad Mountain Mammoth Vein Coal Company, all corporations chartered under the laws of the State of Pennsylvania, and citizens of that State, and Henry Schmoele, William J. Schmoele, and Henry J. Osterman, citizens of the State of Pennsylvania, defendants, in a plea of ejectment, a manifest error has entervened to the great damage of the said defendants, The Schuylkill and Dauphin Improvement and Railroad Company and others, as in their complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf: You are hereby commanded that, if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process, in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the justices of the Supreme Court of the United States on the first Monday in December next, that the record and process aforesaid being inspected, they may cause to be done thereupon, what of right ought to be done.

Witness the Honourable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Philadelphia, this twenty-ninth day of April, A. D. one thousand eight hundred and seventy, and in ninety-fourth year of the independence of the said United States.

[SEAL.] W. GRIER, HIBLER,
Pro. Clerk, C. C. U. S. E. D. of Pa.

44 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct.:

I certify the foregoing to be a true and faithful copy of the record and proceedings of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a certain suit in ejectment therein lately depending between Samuel A. Munson et al., plaintiffs, and The Schuylkill and Dauphin Improvement and Railroad Company et al., defendants.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said circuit court, at Philadelphia, this eighth day of December, A. D. 1870, and in the ninety-fifth year of the independence of said United States.

[SEAL.] SAMUEL BELL,
Clerk Circuit Court U. S., E. D. of Pa.

45 S. C. U. S. December term, A. D. 1870.

THE SCHUYLKILL AND DAUPHIN IMPROVEMENT and Railroad Company et al.
vs.
SAMUEL A. MUSON.
} No. .

Assignments of error by the Schuylkill and Dauphin Improvement and Railroad Company.

1st. The learned court below erred in charging the jury that "no subsequent official survey of this land, under these warrants, without a warrant of survey or order of the board of property, was authorized; therefore, if the jury take the same view of the evidence as the court, the verdict should be for the plaintiff" as set forth in the bill of exceptions to their charge.

2d. The same learned court erred in charging, as set forth in the preceding assignment of error, for the reason that they thereby withdrew from the jury the consideration of the question as to whether or not there might have been, in this case, an order of the board of property for the resurvey made by Wheeler, the evidence of which order has been lost.

NATHAN H. SHARPLESS,
Attorney for the Schuylkill and Dauphin
Imp't & R. R. Co., Plaintiffs in error.

(Indorsed:) December term, A. D. 1870. 1870, Dec. term. No. 362. Schuylkill and Dauphin Improvement & Railroad Co. et al. v. Samuel A. Munson et al. S. C. Assignments of error of The Schuylkill and Dauphin Imp't & R. R. Co. Filed 9th December, 1870. Sharpless.

(Indorsement on cover:) No. 362. The Schuylkill and Dauphin Improvement and Railroad Company, the Bear Mountain Franklin Coal Company et al., plaintiffs in error, vs. Samuel A. Munson & James Watson Williams, and Helen E. M. Williams, his wife. E. Pennsylvania C. C. U. S. Filed 9th December, 1870.

○

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, A. D. 1870. *No. 362.*

The Schuylkill and Dauphin Improvement and Railroad Company et al.

vs.

Samuel A. Munson et al.

BRIEF OF PLAINTIFFS IN ERROR.

SHARPLESS,
Attorney for S. & D. I. & R. R. Co.,
Plaintiffs in Error.

Brief of the Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES,
DECEMBER TERM, A. D. 1870, No. 362.

In Error to the Circuit Court of the United States, for the Eastern District of Pennsylvania.

THE SCHUYLKILL and DAUPHIN IMPROVEMENT and RAILROAD COMPANY *et al.*, Plaintiffs in Error and Defendants below,

v.

SAMUEL A. MUNSON, and JAMES WATSON WILLIAMS and HELEN E. M. WILLIAMS, his wife, in right of the said HELEN E. M. WILLIAMS.

Abstract of the Case.

This was an action of ejectment in which the plaintiffs below claimed title to a tract of land in Porter township Schuylkill county, Pennsylvania, under a warrant from the land office of that commonwealth to one Benjamin Bonawitz, dated the 14th day of December, 1829; a return of survey on which warrant was made and accepted March 5th, 1830, a title being deduced under this proceeding to the plaintiffs.

The answer to this in the first instance was very plain and conclusive. The defendants showed an application and warrant for the same land, by and to one Jacob Yeager, dated the first day of July, 1793, and a survey thereon made July 10th, 1794, returned to the land office and accepted, August 26th, 1794, returned again for patenting, February 27th, 1837; a title under which last mentioned warrant, survey and patent the defendants below deduced to themselves.

In rebuttal to this case the plaintiffs showed that the warrant under which the defendants claimed, was one of eighteen issued on the 1st day of July, 1793, upon eighteen applications, all dated the same day; that all these warrants were placed or found their way into the hands of one Henry Vanderslice, a deputy surveyor of Berks county, who located all of them in one block out of his district in Northumberland county, on the 11th day of July, 1793, which last mentioned surveys were returned into the land office and accepted July 16th, 1793. On the 18th of July, 1793, a caveat was filed by third parties against granting a patent on the Vanderslice surveys, and a certificate was produced that no record could be found of any proceedings before the Board of Property on this caveat.

Upon this evidence the broad question arose: which is the better title? and with it the answer, "undoubtedly the elder one, unless the survey made by Vanderslice out of his district, the return of which was so vague that upon its face it was a nullity, renders the second survey on this warrant by Wheeler, made in his proper district, duly returned, accepted and unquestioned for more than thirty-five years, absolutely void."

The learned judge disposed of this question *as a matter of law*, saying to the jury (Record, p. 17):

"The court sees no defect in the plaintiff's title under this warrant and survey. The only claim which the defendants have set up, is under warrants located several miles from the land in controversy, by surveys returned and accepted.

"No subsequent official survey of this land under these warrants, without a warrant of survey or order of the Board of Property, was authorized; therefore, if the jury take the same view of the evidence as the court, the verdict should be for the plaintiffs."

The learned judge, therefore, not only ruled that the second (Wheeler) survey was void, but he took from the jury a right to presume that the Board of Property at the time of the making of the Wheeler survey, which was thirty-five years before the younger warrant was issued, and more than seventy years before the trial of this case, had made an order for a re-survey, the evidence of which has been lost.

Assignments of Error.

1st. The learned court below erred in charging the jury that "no subsequent official survey of this land, under these warrants, without a warrant of survey or order of the Board of Property, was authorized; therefore, if the jury take the same view of the evidence as the court, the verdict should be for the plaintiffs," as set forth in the bill of exceptions to their charge.

2. The same learned court erred in charging as set forth in the preceding assignment of error, for the reason that they thereby withdrew from the jury the consideration of the question as to whether or not there might have been in this case, an order of the Board of Property for the resurvey made by Wheeler, the evidence of which order has been lost.

Argument.

The second assignment of error is the one which will be pressed.

Granting the general rule to be as it unquestionably is in Pennsylvania (Bellas *v.* Cleaver, 4 Wright, 260, per Thompson, J.; Gratz *v.* Beates, 9 Wright, p. 495, same judge, and Hughes *v.* Stevens, 7 Wright, p. 197, per Strong, J.), that after a survey upon a warrant has been returned and accepted, that the warrant is *functus officio*, and that no title under a re-survey can be made, unless such re-survey was ordered by the Board of Property, what do we find on coming to apply the rule to the facts of this case?

On July 1st, 1793, Jacob Yeager applied to the land office for a warrant for four hundred acres of land, in Berks county; paid for that quantity to the commonwealth; within fourteen months procured a survey of so much land in Berks county, to be returned to the land office and accepted; he and they through whom his title came to the defendants below paid taxes, and were in peaceable, undisturbed possession of this tract for thirty-five years, and now the land having been tested and several valuable coal veins found upon it, and improvements at a great expense having been put upon it, we are to be turned out of possession by a speculator, who has become the holder of an overlaying warrant issued thirty-five years after the one under which we claim; the junior warrant, moreovor, having attained also the ripe age of thirty-five years, before its holder thought it worth while to claim actual possession under it.

No layman could be made to understand this as other than manifest injustice and a grievous wrong.

And it can fare but little better with an educated lawyer. The land office of Pennsylvania has always been in the hands of laymen; it would be unreasonable to expect of them to preserve accurate written memorials of all their proceedings in each of the many thousands of warrants issued thereout; their minutes are not records. (Sergeant's Land Law, p. 172.) The court and jury allow them no more weight than in their judgment they are entitled to; C. J. Tilghman, White *v.* Lessee of Kyle, 6 Sergt. & Rawle, p. 109; and were often very imperfectly kept. (Introduction to Huston on land titles in Pennsylvania, pp. 3 & 4.)

Now when the Vanderslice surveys were returned, what appeared to every one?

I. They had been made out of his district and jurisdiction in another county. An act just passed and which had not then received any judicial construction, 6th sect. act of 3d April, 1792, Bright. Purdon's Dig. p. 631, pl. 82, declared "every survey made by any deputy-surveyor without his proper district, shall be void and of none effect."

II. The survey was bad upon its face. No one could possibly have found the land from it; it did not even inform the warrantee in what county his new possession lay; and

III. A caveat was immediately filed by parties in Northumberland county, who claimed the land under an earlier warrant.

There is every reason to suppose that this matter was called to the attention of the Board of Property (consisting at that time of the secretary of the land office, the receiver-general, the surveyor-general, and master of the rolls for the time being, *or any three of them;* Act of January 8th, 1791, Bright. Purdon's Dig., Laws of Pennsylvania, p. 619, pl. 8); and that they by a minute probably endorsed on the back of a new copy of the warant placed in Wheeler's hands, ordered the re-survey. Upon any other theory it is impossible to understand the acceptance of the return of the re-survey made by Wheeler. The practice of the land office at that time was that the original warrant remained in the office of the surveyor-general; a copy of it had been placed in the hands of Vanderslice, one of his deputies for Berks county, whose survey upon it was returned into the land office, and there remains to this hour. Now how did Wheeler get the same or another copy of this warrant on which to make his survey and return? If there was an order of the

Board of Property that it should be issued or re-issued to him, it is admitted by the court below, and on all hands, that the plaintiffs in error have the better title.

We only know that a copy of the warrant got into the hands of Wheeler; that he made a survey upon it, returned it to the land office within fourteen months of the date of the warrant, which return was accepted by the surveyor-general and a patent issued upon it. The surveyor-general was a member of the Board of Property. How came he to accept the second survey, unless it had been duly authorized?

There is no suggestion of fraud on his part, nor anything in the case upon which to hang a suspicion of it. What again is the explanation of the Board of Property taking no action upon the caveat of Kunckel and Bowen, other than that having ordered a re-survey on this warrant elsewhere, a decision of the question arising on that caveat was no longer material to any one?

And just at this point it may be well to notice what became of the land surveyed in Northumberland county, by Vanderslice, and claimed by Kunckel and Bowen in their caveat. They had a good title to it, or they had not. If they had, Vanderslice had no right to locate this warrant on their land. If they had not, Yeager's abandonment of the survey made for him, and the fall of the caveat, in nowise enured to their benefit. The land reverted to the commonwealth, per Gibson, C. J., Orr *v.* Cunningham, 4 Watts

& Sergeant, p. 294. S. P. per Rogers, J., Heath *v.* Knap, 1 Barr, pp. 482, 492.

The point on which we suppose this case to turn, to wit:

That a good title can be claimed as against the commonwealth and her subsequent grantee, upon a warrant and a re-survey, an acquiescence therein for more than twenty-one years, and the payment of taxes by the warrantee on the land so re-surveyed, notwithstanding the warrantee after that efflux of time may not be able to produce written evidence from the land office of an order by the Board of Property for the re-survey;

is new in Pennsylvania, and has never been decided by our Supreme Court, unless practically decided in our favor by the cases hereafter noted, and many analogies of the law sustain the plaintiffs in error, and we are particularly and emphatically sustained by the decisions of our Supreme Court in relation to what are called chamber surveys.

Now 1st, as to the authorities supporting our point directly:

" It has been stated at a preceding page that there are a variety of cases to which the provisions of the Statute of Limitations (21 Jac. I. c. 16), do not apply either directly or by construction; and that in order to extend the beneficial operation of the statute courts of law and equity have established certain positive rules, framed by analogy to the provisions it contains, and which, as far as possible, meet and comprehend the omitted cases; that in all such cases, where the question concerns the title to real property, they hold peaceable enjoyment for a period of twenty years, to be *prima facie* evidence of absolute and rightful ownership." Matthews Presumptive Evidence, p. 187, citing a number of American cases supporting the doctrine. "On the same principle a deed enfranchising a copyhold, was, in one case, presumed from long enjoyment even against the Crown." Roe on the Demise of Johnson *v.* Ireland, 11 East. p. 280.

"Another instance of the favorable disposition of the courts to protect long established titles against dormant claims, is afforded in the case of an old recovery suffered at a time when the immediate freehold of the estate was apparently outstanding, in which case if a subsequent possession of twenty or thirty years has corresponded with the uses of the recovery, a previous surrender of one freehold will be presumed." Green *v.* Proude, 1 Vent. 257; S. C., 1 Modern Rep. p. 117.

After twenty years' possession, a lease will be presumed in order to support a release. Holmes *v.* Ailsbie, 1 Maddock's Chan. Rep. p. 551. It is true this case was decided under the fifth section of the Act of 14 Geo. II., c. 20, but the rule at common law was undoubtedly the same. Knox *v.* Jenks, 7 Mass. p. 488. Society for Propagating the Gospel *v.* Young, 2 N. H. Rep. 310; Blossom *v.* Cannon, 14 Mass. 177, and Brown *v.* Wood, 17 Mass. p. 68.

"For the purpose of confirming and securing titles of long enjoyment, acts of Parliament, if needful, may be presumed." Lord Ellenborough, C. J., 6 East. Rep.

p. 215; Beally *v.* Shaw; Mathers *v.* Trinity Church, 3 Serg. & Rawle, p. 509; Schauble *v.* Jackson, 2 Wendell, p. 13.

"And this position seems to be true, as well in regard to rights wherein the public are interested, as to those which concern individuals only." Rex *v.* Montague, 4 Barn. and Cress. p. 598.

Strong presumptions are to be made in favor of records irregularly kept, after a great lapse of time. Shaw *v.* Boyd, 2 Jones' (Penn'a) Rep. p. 217, per Coulter J.

In order to support an alleged title, accompanied by thirty years' possession, *the entry of a judgment may be presumed*—per Grier, J. Cromwell *v.* The Bank of Pittsburgh, 2 Wallace, Jr., C. C. Rep. p. 569.

A long continued claim of title, with acts of ownership uncontested by adverse possession on the part of him who is supposed to have conveyed, will be sufficient to supply the place of an absent link in a chain of title. The law will presume a conveyance to have been made; per Gibson, C. J., in Hastings *v.* Wagner, 7 Watts & Sergeant, p. 215.

II. As to the analogy to be drawn from the rulings in Pennsylvania in regard to chamber surveys—

Mr. Comly shows conclusively in his annexed opinion that a re-survey, without an order of the Board of Property, is not absolutely and at all events void; if so, it would be incapable of confirmation; sustaining himself fully in this by the opinion of Tilghman, C. J., in Light *v.* Woodside, 10 Serg. & Rawle, p. 23.

In this particular, a re-survey differs from a chamber survey; that is one which the deputy-surveyor plots out in his office on paper, without going upon the ground to run the lines and mark the corners.

By the act of 8th of April, 1785, sec. 9, Bright. Purd. Dig. p. 628, pl. 65—surveys thereafter to be returned into the land office, are directed to "be made by actual going upon and measuring the land and marking the lines, * * * * after the warrant authorizing such survey shall come into the hands of the deputy-surveyor;" and chamber surveys are to "be accounted clandestine *and shall be void*."

Yet a series of cases, to wit:

Mock *v.* Astley, 13 Serg. & Rawle, p. 382;
Caul *v.* Spring, 2 Watts, p. 390;
Norris *v.* Hamilton, 7 Watts, p. 91;
Nieman *v.* Ward, 1 Watts & Serg., p. 68;
And Ormsby *v.* Ihmsen, 10 Casey, p. 462;

All fully sustain the doctrine that after a lapse of twenty-one years from a return of a survey into the land office, there arises a conclusive presumption that it was regularly made upon the ground as returned. In the last of these cases, Strong, J., says, p. 469, in reference to a charge of the judge below, that such a presumption might be rebutted by proof that no marks of the survey could be found upon the ground.

"To this we cannot assent. Such is not the nature or the weakness of the presumption, which attends a survey returned without objection for more than twenty-one years. It is more than a mere probability; it is *presumptio juris et de jure*."

Does not the principle which ruled this case fully maintain the rights of the plaintiffs in error here?

To support their position, that without an order from the Board of Property the re-survey made by Wheeler was void, our adversaries will probably cite:

Deal *v.* McCormick, 3 Serg. & Rawle, p. 343.
Oyster *v.* Bellas, 2 Watts, p. 397.
McKelvy *v.* Gilleland, 3 Watts, p. 312.
Bellas *v.* Cleaver, 4 Wright, p. 260.
Hughes *v.* Stevens, 7 Wright, p. 197.
And Gratz *v.* Beates, 9 Wright, p. 495.

In no one of these cases, so far as appears from the report, was a junior warrant twenty-one years younger than the one upon which the unauthorized re-survey was alleged to have been made. *And a close examination of the books lead counsel for plaintiffs in error, to confidently assert that no case with this feature can be produced from the Pennsylvania Reports, sustaining the defendants in error on the point here in controversy.*

An opinion given the plaintiffs in error, by eminent legal counsel, on this title, is hereto annexed.

NATHAN H. SHARPLESS,
Attorney for S. & D. Imp't & R. R. Co.,
Plaintiffs in Error.

Opinion of Counsel.

DANVILLE, *Dec.* 24, 1870.

GEORGE K. TRYON, ESQ.,

DEAR SIR:—According to your request, I have written out my opinion as to the validity of the survey made July 10th, 1794, by William Wheeler, Deputy Surveyor, in pursuance of a warrant to Jacob Yeger, dated July 1st, 1793, as against the title under a warrant to Benjamin Bonewitz, as follows:

Statement of the Case.

1st July, 1793. Warrant to Jacob Yeger for four hundred acres of land adjoining lands this day granted to William Witman, Jr.

Return of survey by Henry Vanderslice as follows:

"By virtue of a warrant dated the first day of July, 1793, and surveyed the 11th day of the same month and year to Jacob Yeger. The above described tract of land situate on branches of Catawissey, on the north side of Mahonoy mountain, containing four hundred and fourteen acres and thirty-three perches and allowance."

Certified extract from list of returns of Henry Vanderslice, made July 3d, 1793, which contains Jacob Yeger, four hundred and fourteen acres and thirteen perches.

Certified copy of caveat filed 18th July, 1793, by John Kunkel and Aaron Bowen.

Return of survey by William Wheeler, Dep. Surveyor, as follows:

"In pursuance of a warrant dated the 1st day of July, 1793, surveyed the 10th day of July, 1794, unto Jacob Yeger the above described tract of land, situate in Pinegrove township, in the county of Berks, containing four hundred and forty acres and sixty-four perches and the allowance of six per cent. for roads," &c.

Certified extract from list of returns of William Wheeler, made the 26th day of August, 1794, containing Jacob Yeger, four hundred and forty acres and sixty-four perches.

This latter survey was returned for patenting, February the 27th, 1837, and a patent issued on that day to A. J. Jones and Charles A. Snyder.

Warrant dated December 14th, 1829, to Benjamin Bonewitz, for sixty-six acres in Lower Mahantongo township, Schuylkill county, adjoining lands of John Huber and others (naming them).

Return of survey in pursuance of last mentioned warrant, surveyed on the 18th day of June, 1829, and returned to the land office, and accepted March 5th, 1830.

The land described in the survey returned by Henry Vanderslice was situate, in 1793, in the county of Northumberland, and out of his district.

The land described by the survey returned by William Wheeler, is situate in Porter township, Schuylkill county, formerly Berks county.

The land surveyed to Benjamin Bonewitz is a part of the tract surveyed and returned by William Wheeler on the Jacob Yeger warrant, and the question is which is the better title to the land covered by both of these surveys.

Opinion.

Official copies of the warrant and survey of Benjamin Bonewitz have not been furnished to me, but a copy of the notes of evidence taken on the trial of the case of Samuel A. Munson and others *v.* The Schuylkill and Dauphin Improvement and Railroad Company and others, in the Circuit Court of the United States at Philadelphia, in which the date of the warrant and that of the survey are stated to be as I have represented.

If these dates are correct, the survey of Benjamin Bonewitz must have been made some six months before the warrant issued, and is therefore void. Act April 8th, 1785, sec. 9 (Purd. Dig. 628, pl. 65). Barton *v.* Smith, 1 Raw. 403. Schnable *v.* Dougherty, 3 Barr, 398. Weidman *v.* Kohr, 13 Serg. & R. 23.

There may have been, and most probably there has been, a mistake made in taking down these dates or in copying them, and I will consider the survey as regularly made after the warrant was issued, and then the question will be whether the survey on the 10th of July, 1794, was a valid survey on the 14th of Decem-

Certified copy of caveat filed 18th July, 1793, by John Kunkel and Aaron Bowen.

Return of survey by William Wheeler, Dep. Surveyor, as follows:

"In pursuance of a warrant dated the 1st day of July, 1793, surveyed the 10th day of July, 1794, unto Jacob Yeger the above described tract of land, situate in Pinegrove township, in the county of Berks, containing four hundred and forty acres and sixty-four perches and the allowance of six per cent. for roads," &c.

Certified extract from list of returns of William Wheeler, made the 26th day of August, 1794, containing Jacob Yeger, four hundred and forty acres and sixty-four perches.

This latter survey was returned for patenting, February the 27th, 1857, and a patent issued on that day to A. J. Jones and Charles A. Snyder.

Warrant dated December 14th, 1829, to Benjamin Bonewitz, for sixty-six acres in Lower Mahantongo township, Schuylkill county, adjoining lands of John Huber and others (naming them).

Return of survey in pursuance of last mentioned warrant, surveyed on the 18th day of June, 1829, and returned to the land office, and accepted March 5th, 1830.

The land described in the survey returned by Henry Vanderslice was situate, in 1793, in the county of Northumberland, and out of his district.

The land described by the survey returned by William Wheeler, is situate in Porter township, Schuylkill county, formerly Berks county.

The land surveyed to Benjamin Bonewitz is a part of the tract surveyed and returned by William Wheeler on the Jacob Yeger warrant, and the question is which is the better title to the land covered by both of these surveys.

Opinion.

Official copies of the warrant and survey of Benjamin Bonewitz have not been furnished to me, but a copy of the notes of evidence taken on the trial of the case of Samuel A. Munson and others *v.* The Schuylkill and Dauphin Improvement and Railroad Company and others, in the Circuit Court of the United States at Philadelphia, in which the date of the warrant and that of the survey are stated to be as I have represented.

If these dates are correct, the survey of Benjamin Bonewitz must have been made some six months before the warrant issued, and is therefore void. Act April 8th, 1785, sec. 9 (Purd. Dig. 628, pl. 65). Barton *v.* Smith, 1 Raw. 403. Schnable *v.* Dougherty, 3 Barr, 398. Weidman *v.* Kohr, 13 Serg. & R. 23.

There may have been, and most probably there has been, a mistake made in taking down these dates or in copying them, and I will consider the survey as regularly made after the warrant was issued, and then the question will be whether the survey on the 10th of July, 1794, was a valid survey on the 14th of December, 1829, when the warrant issued to Benjamin Bonewitz.

There are numerous cases, among which are Deal *v.* McCormick, 3 Serg. & R. 343–349; Healy *v.* Moul, 5 Serg. & R. 181–187; Oyster *v.* Bellas, 2 Watts, 397; McKelvy *v.* Gilleland, 3 Watts, 312, and Cassidy *v.* Conway, 1 Casey 240, in which the Supreme Court have held that after a survey has been returned to the land office, no second survey can legally be made without a new order from the surveyor-general or from the Board of Property. This is the general rule, and the fact that the first survey was made by the deputy surveyor out of his district and out of the county to which his district belonged, would not make it an exception to this rule, as the 15th section of the act of April 8th, 1785, does not apply to land in the old purchases, and such a survey by a deputy-surveyor out of his district would be irregular, but would not be void. Wright *v.* Wells, 1 Yeates, 286; Harris *v.* Monks, 2 Serg. & R. 557, and Goddard *v.* Gloninger, 5 Watts, 208.

In Oyster *v.* Bellas, 2 Watts, 397, the first survey was a chamber survey, and the court held such a survey not to be a nullity, but to be only voidable, and that it was such an expenditure of the authority under the warrant, as to preclude any second survey without an order of re-survey. But the survey returned by Henry Vanderslice, as appears by the certified extract of the list of his returns before me, was returned and accepted on the 3d day of July, 1793, two days after the warrant issued, and eight days *before* the survey purports to have been made, the survey having been returned as made on the 11th of July, 1793. The surveyor-general had no power to accept such a return as this. It was not the acceptance of a return of a survey, but of a plot of a tract on paper, which did not purport that the tract had then been surveyed on the ground, and it could not amount to anything more than a return by the deputy-surveyor, of a draft of a tract of land stating expressly that it was a chamber survey, would have done. I know of no case in which the acceptance of such a return has been sanctioned, and I am of the opinion that it was a nullity to all intents and purposes. The impossibility of the survey ever having been made is apparent from the return of the survey itself, considered with the date of its return into the land office, and could deceive nobody. Besides this, the return simply states the land to be " on branches of Catawissey on the north side of Mahonoy mountain, without stating that it was in the deputy's district or in the county of Berks. This departure from the usual form cast a suspicion upon it, and, if it had been examined, would probably have secured its rejection. I have no knowledge of any case like this having been decided by any of our courts, and I cannot see on what principle of law this absurd return, false on its face, can be presumed to have been made with the consent of the owner of the warrant, or on what principle of right or justice such a return can prevent him from having the land, for which he had paid the State, surveyed to him on his warrant, without interfering with the claim of any one else.

On the 18th of July, 1793, fifteen days after the return of the survey, to the surveyor-general's office, and but one week after the survey purports to have been made, the caveat of Kunkel and Bowen was filed. The owner of the Jacob Yeger warrant could not sustain this return of Vanderslice, nor could he contend with Kunkel and Bowen, before the Board of Property with any prospect of success. A decision in his favor was simply an impossibility. He had paid for four hundred acres of land, but had got none. Vanderslice had been ordered to survey the land for him, but his return showed that he had not done it. What was he to do? Clearly he should have applied to the surveyor-general or to the Board of Property for an order on Vanderslice, to certify the copy of the warrant in his hands to Wheeler for execution, or to issue a new copy of the warrant (which always remained in the surveyor-general's office), and to direct that to Wheeler to be executed. After a lapse of more than seventy years, it is but right to presume that something of this kind was done, and that the evidence of it has been lost. The surveyor-general certainly, on the 26th of August, 1794, accepted the return of the survey made by Wheeler on the 10th of July, 1794, and it is not presumable that he would have done so, if it had been made without any authority. It is not easy to believe that Wheeler, without having the copy of the warrant which Vanderslice had previously had, or some other authority from the land office, would have made a survey and returned it, as made in pursuance of a warrant that

Vanderslice had already executed. In Goddard *v.* Gloninger, 5 Watts, 221, Justice Huston, speaking of surveys made and returned by persons who never had any commissions as deputy-surveyors, having been received in evidence by the courts, says, "I should suppose this was on the idea that the surveyor-general had given a special deputation which was lost, and that his receiving the return was evidence that he had given such special deputation;" and in Stephens *v.* Cowan, 6 Watts, 515, Justice Kennedy speaking of a survey made in Westmoreland county, on a warrant for land in "the county of Northumberland or Huntingdon," says, "It was certainly competent for the surveyor-general, upon being informed by the holder of the warrant here, that the land he wished to have surveyed under it lay in Westmoreland county, to have directed it to his deputy in that county; and if a survey had been accordingly made by such deputy, it scarcely can be doubted but it would have been good. Now for aught that appears to the contrary, the survey here may have been made by the deputy surveyor of Westmoreland county, under such an authority, *written upon the copy of the warrant put into his hands*, which has not been produced. And after acquiescence of upwards of thirty years, on the part of everybody, in the survey as made and returned here, it ought to be presumed on account of the public peace and security of titles, that it was rightfully made." And in Bell *v.* Levers, 4 Dal. 210, the court say that "in an old transaction, if the title depends upon it, the examination should not be very strict; and that every doubt should operate in favor of the validity of the survey." See also Bellos *v.* Levan, 4 Watts, 294.

I do not know whether it was the habit to enter in any of the books of the surveyor-general's office the name of the deputy to whom a copy of a warrant was directed, but think it was not. I have never seen a copy of any such entry, nor have I ever heard that they were ever made. I, however, by letter requested the present surveyor-general to have search made in his office, for anything that would show whether a copy of the Jacob Yeger warrant had been directed to Henry Vanderslice or William Wheeler, and I have received his reply, stating that after very considerable search no such evidence can be found in his office. The direction of the copy of the warrant was usually on its back. If the offices of the district surveyors of the counties of Berks and Schuylkill, have not already been searched for the copy or copies directed by the surveyor-general, a careful search should be immediately made for them, though knowing, as I do, how carelessly the official papers have been kept by deputy-surveyors, how frequently the out-going officer has carried away what he pleased of them as his private papers, and how often interested parties have surreptitiously possessed themselves of important papers belonging to these offices, I have very little hopes of a successful search at this late day.

The syllabus of the case of Deal *v.* McCormick, 3 Serg. & Rawle, 343, is that after a survey had been made and returned into this office, a second survey, without an order of the Board of Property, is merely void, and that of McKelvy *v.* Gilleland, 3 Watts, 312, is to the same effect, but the law is not so stated by the court in the opinion in either of these cases. On the contrary in Light, *v.* Woodside, 10 Serg. & Rawle, 23, it was decided that such a second survey might be rejected, but if it was accepted and a patent issued upon it, the title would be good. Such a survey therefore is not void or else it would be incapable of confirmation by any act of the officers of the land office. In Oyster *v.* Bellas, a chamber survey was held not to be altogether void, yet such a survey would not be made valid by a patent; Schnable *v.* Dougherty, 3 Barr, 392; in which case the junior title commenced ten years after the patent for the chamber survey was granted, and prevailed against it. Yet when a chamber survey has been returned and accepted for twenty-one years, without any other claim being made during that period for the land it described, it is presumed by the courts to have been regularly made on the ground, and they will not permit that presumption to be rebutted, Spring *v.* Caul, 2 Watts. 390; Collins *v.* Barclay, 7 Barr. 67; Norris *v.* Hamilton, 7 Watts, 91; Ormsby *v.* Ihmnsen, 10 Cas. 462; and there are many other cases to the same effect. The survey of the 10th of July, 1794, made by Wheeler was returned into the land office, and accepted on the 26th of August, 1794, and from that time until the warrant was applied for by Benjamin Bonewitz, on the 14th of December, 1829, a period of over thirty-five years, it remained without exception by the State or any of its citizens; on the contrary, all acquiesced in it and regarded it as a good and valid survey. I think that lapse of time should prevail in favor of a second survey, or a warrant returned and accepted as in the case of a chamber survey. They are not forbidden by any act of Assembly, while chamber surveys are; and they may be accepted and confirmed by patents, whereas chamber surveys cannot. I, therefore, think that a distinction in favor of the latter, in this respect, would be unreasonable and merely capricious; and believing so, I am satisfied that the Supreme Court, should the question come before them, will hold such a second survey, as that made by Wheeler, to be protected by a long lapse of time after its return and acceptance, as in the case of a chamber survey. Then, in nearly the words of Chief Justice Tilghman in Light *v.* Woodside, 10 Serg. & Raw. 25, speaking of such a second survey, I express my opinion that everything substantial has been done. A survey was made upon the ground by the deputy-surveyor of the district—this survey has been returned and accepted, the purchase money and fees of office have been paid, and thirty-five years elapsed after its acceptance by the officers of this State, and I cannot see on what principle of law or of public policy the commonwealth or her courts can, after such a lapse of time, permit Benjamin Bonewitz or any one else, to challenge the regularity of the survey, or call upon the present owners of the title under the Jacob Yeger warrant to produce the order of the surveyor-general by virtue of which it was made. I am of the opinion that the survey of the 10th of July, 1794, had become valid and unimpeachable on the 14th of December, 1829, and that after such a lapse of time as had then taken place, the courts would presume that the necessary order from the land office to make this second survey existed when it was made and had since become lost.

JOSHUA W. COMLY.

Road [illegible]
district

4 Nash

Duncan Day

5 S R

10 S R

Runway Horse

[illegible] in [illegible]

M Lyra

3 S R

runway good

10 S R

5 [illegible] Sel

N-Y 6
619-20
157
24
349
24
150

Supreme Court of the United States.

DECEMBER TERM, 1870. No. 362.

THE SCHUYLKILL AND DAUPHIN IMPROVEMENT AND RAILROAD COMPANY *et al.*,

PLAINTIFFS IN ERROR,

vs.

SAMUEL A. MUNSON AND JAMES WATSON WILLIAMS AND HELEN E. M. WILLIAMS, HIS WIFE, IN RIGHT OF SAID HELEN E. M. WILLIAMS.

Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

BRIEF OF DEFENDANTS IN ERROR.

The Leisenring Steam Printing House, 237 and 239 Dock Street, Philadelphia.

Supreme Court of the United States.

DECEMBER TERM, A. D. 1870. No. 362.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

THE SCHUYLKILL AND DAUPHIN IMPROVEMENT AND RAILROAD COMPANY *et al.*, Plaintiffs in Error,

vs.

SAMUEL A. MUNSON AND JAMES WATSON WILLIAMS AND HELEN E. M. WILLIAMS, HIS WIFE, IN RIGHT OF SAID HELEN E. M. WILLIAMS.

BRIEF OF DEFENDANTS IN ERROR.

The counsel for the plaintiffs in error do not now deny the soundness of the learned judge's charge, "that no subsequent official survey of this land under these (defendants') warrants, without a warrant of survey or order of the board of property, was authorized;" but the effort is made to show that there was error in not allowing the *jury* to presume and find, in this case, that there had been such an order of resurvey, the evidence of which has been lost.

It is plain, however, and the nature of the counsels' argument concedes it, that if any presumption were to be made in a case like the present, it would not be one of fact for the jury, but a presumption of law to be made by the court. Counsel present the point as one of law, upon page 8 of their paper book,—to wit, that after the lapse of twenty-one years from the acceptance of a second survey made upon a warrant, the authority of which is confessedly exhausted by a prior survey, an order of the board of property authorizing such a resurvey will be conclusively presumed.

It is an attempt to apply the maxim "*Omnia præsumuntur rite et solenniter esse acta*" for the purpose of supplying a distinct, independent act, the very origin of defendants' title, and without showing which they have none at all.

It is denied, upon principle and authority, that such is the law of Pennsylvania.

Greenleaf, 1 vol. Evidence, s. 20, speaking of legal presumptions, and the proper application of this maxim, says, it does not apply to records and public documents, which are supposed always to remain in the custody of the officers charged with their preservation, and which, therefore, must be proved, or their loss accounted for, and supplied by secondary evidence.

The scope of the rule is shown in the application of it to the case of sales of land, under the authority of courts, by executors, administrators, or other officers. The *authority* to sell, as well as the official character of the party, being provable by record or judicial registration, must, in general, be proved; that being done, the intermediate proceedings,—the *formalities* of the sale,—after lapse of sufficient time, will be presumed to have been observed.

In Brunswick *vs.* McKean, 4 Greenleaf's Rep., 508, certain resolutions of meetings of the inhabitants of Brunswick were rejected because unaccompanied by proof of the authority for calling the town meetings, to show that the votes were authorized, no reason being assigned why such proof could not and was not produced, although it was argued that—the transactions being of more than thirty years' standing—the existence of proper warrants calling the meetings was to be presumed.

And our own Supreme Court of Pennsylvania, in Siechrist *vs.* Baskin, 7 W. & S., 403, decided that a party claiming title to land through a sheriff's sale must show the authority upon which such sale was made; the existence of an order of the court was not to be inferred from the acknowledgment of the deed by the succeeding sheriff. The acknowledgment of the sheriff's deed was made in 1804, between thirty and forty years before the trial of the cause. The court said, it would be mischievous to apply the maxim to such a case as this—that the judgment and execution might as well be presumed.

The same case was before the court again, in 6 Barr, 154, and this doctrine reaffirmed. The court said, the allegation here is, that the record has been lost, but this rests merely in assertion, since it is not yet shown that the record was ever made. A missing record may be proved by secondary evidence, but then its former existence and loss must be first established by competent proof.

Does not the principle of these cases apply to an order of the board of property?

Sergeant (Land Law, page 172) says, it is a court legally constituted for the trial of caveats, which are in the nature of equitable actions. It is not a court of record, in the strict sense of the term, but the books and papers are so far records that, by the act of 1781, certified copies are evidence.

In Ream *vs.* Commonwealth, 3 S. & R., 207, an indictment charging the defendant with altering a certain registry and record in the surveyor general's office, containing a list of returns, &c., was sustained. Tilghman, C. J., said, the jury have found the book to be a record, and we must take it to be so, unless none of the books in the surveyor general's office are to be considered as public registers or records; and he concludes, referring to their importance, and the act of 9th April, 1781, establishing a land office, that they have been recognized as records by the Legislature.

It is submitted, that there is no analogy between the case of chamber surveys and the present case. In the former, the presumption is only that the survey was made *properly*,—"*rite et solenniter*," as prescribed by the act of Assembly. A survey is made and returned, which, after a sufficient lapse of time, is conclusively presumed to have been made on the ground. It is a fair case for the application of the maxim ; but, in the present case, the presumption sought to be made is not of an act which the board of property was *bound* to do, or one collateral to or regularly accompanying another, shown to exist. It is an independent authority, absolutely necessary to legalize the subsequent survey, and without which it is as worthless as if there had never been any warrant at all. That there can be no presumption in such a case, has been expressly decided in Wilson *vs.* Stoner, 9 S. & R., 39.

It was there decided that a survey is not evidence *without showing an authority to make it, or proving that such authority existed and was afterwards lost;* and that possession for upwards of thirty years, under a survey found in the handwriting of an assistant deputy surveyor, endorsed "copied for return," with a memorandum by him that it was made under an order, and the lines of which are marked on the ground, is not sufficient to presume a warrant.

This case covers the whole ground of the present. The defendants' survey was made in 1770,—that under which plaintiff claimed in 1817, nearly fifty years after. The court below admitted the survey of 1770, and charged the jury that they might presume the existence of an authority to make the survey, although it could not be produced. The Supreme Court reversed the judgment. The opinion of the court contains a clear statement of the nature of the legal presumption which it was asked to make.

Although the general rule of law, that after a warrant has been once executed it is *functus officio*, and that no title under a resurvey can be made without an order by the board of property authorizing the same, is conceded, the following review of

Lupht v Woodside –
not a survey or
claimed [illegible]
[illegible] [illegible] [illegible]
equitable

some of the prominent cases on this subject will show the extent to which the rule has hitherto been carried:—

In Lessee of Porter *vs.* Ferguson, 3 Yeates, 60, the court said, no benefit could be derived under the later survey, unless by showing the warrant or order on which it was grounded.

In Light *vs.* Woodside, 10 S. & R., 23, the first survey upon defendant's warrant was made in 1790 and *not accepted;* the second, in 1805, *accepted* and *patent issued.* This was allowed to prevail against a survey made in 1789 for the plaintiff, because he was found to have consented to it and encouraged the purchaser to make improvements. The C. J. did not deny that the survey of 1805 might not have been rejected; the court only said the plaintiff's mouth was closed. And see Oyster *vs.* Bellas, *infra,* where C. J. Gibson said, this case was distinguished from the unbroken series of decisions, holding a fresh order to be indispensable to a valid survey made subsequently to the return of a preceding one.

In Deal *vs.* McCormick, 3 S. & R., 346, Gibson, J., said, the law is well settled that after a survey made and returned unto the office, a second survey, without an order of the board of property, is *merely void.*

In Oyster *vs.* Bellas, 2 Watts, 397, the first survey under the plaintiff's warrant was a *chamber* survey, and the second was *accepted* and *patent issued* thereon. The counsel for plaintiffs, the appellees, argued as counsel do here, that the *acceptance* of the *resurvey* was equivalent to a precedent authority, but the court, not noticing this, held the chamber survey to be an exhaustion of the authority of the warrant, and that the new survey on the same warrant, without a renewal of its authority, conferred no title.

The law was reiterated by the court in Cassiday *vs.* Conway, 1 Casey, 240, notwithstanding an argument by counsel of the plaintiff in error, which seems to have been the model of that now addressed to the court by the other side.

Finally, in Hughes *vs.* Stevens, 7 Wr., 197, Justice Strong said, that a resurvey without an order for it amounts to no-

5 Watts & Serg
Land granted by patent
upon any rights ag [illegible]

thing; without such an order, the attempt of the deputy surveyor to locate the warrants a second time was an entirely unofficial act, which gave the warrantee no rights, either against the Commonwealth or any other claimant.

II. If it be considered that the question of presumption, in a case like the present, is not for the court, the questions arise, whether the learned court did, in fact, withdraw the consideration of this matter from the jury, and whether, if it did, it was error in this case.

The entire charge of the court is contained in the bill of exceptions; no points or request for instructions were submitted by either party.

It is submitted by defendants in error—

I. That there was no binding instruction given to the jury; the charge was but the expression of an opinion upon the evidence, which the court had a right to make.

II. That, at most, there was but the *want* of direction by the learned judge upon the question of the presumption of an order of the board of property; such an omission will not be considered to be error. Where no direction is asked for, the court is only answerable for errors of commission.

Mere omission to say what might have been properly said, is not just ground of complaint by a party who submitted no propositions and suggested no views of the testimony for the consideration of the court. Judges are entitled to expect this kind of assistance from counsel; and when it is not rendered, counsel may still have the benefit of errors of commission, but they should not complain of omissions. By Woodward, J., Reeves *vs.* R. R. Co., 6 Casey, 460.

A simple omission of a court to charge the jury as fully on some of the points of a case, about which it is charging generally, as a party alleges in error that the court ought to have charged, cannot be assigned for error, when it does not appear that the party himself made any request of the court to charge in the form now asserted to have been the proper one. By Davis, J., Express Co. *vs.* Kountze Bros., 8 Wallace, 343.

III. But there was no *evidence* whatever in this case from which a *jury* could presume that there had been an order of the board of property, and that it was lost. The plaintiffs showed that a caveat was entered upon the return of the first survey, and that no proceedings or action was ever had by the board of property thereon. *Could* a jury have found that there had been an order of resurvey, in the face of this, simply from lapse of time?

The effect of the caveat was to suspend further proceedings, except upon a special order of the board of property, until the caveat be determined. Jones on Land Office Titles, 69.

In Lessee of Harris *vs.* Monks, 2 S. & R., 557, the court said, that the departure of the surveyor general from the usual forms of his office, (making a special deputation to a deputy surveyor, out of his district,) *pending a caveat* without the immediate order of the board of property, was unjustifiable either by law or custom, and that surveys made in pursuance of such special deputations could not be supported.

It would have been error to have submitted the question to the jury and to have allowed them, in the expressive language of C. J. Tilghman, "to presume that a transaction was right because it appears to be wrong."

It is error in a court to submit the decision of a fact to the jury, unless there be some evidence of such fact. Dubois *vs.* Lord, 5 Watts, 49.

In Haines *vs.* Stouffer, 10 Barr, 363, the court below suggested to the jury a possible understanding between the parties—of which there was no evidence whatever—in order to reconcile conflicting testimony. The cause was reversed; and it was said that where a state of facts could not be inferred on a demurrer to evidence, it is error to submit it to the jury as possible.

It is error to submit to the jury a fact alleged by the defense, of which the defendant gives no evidence, and the plaintiffs give some evidence to disprove. Lower *vs.* Clement, 1 Casey, 63.

If the evidence be such as cannot fairly warrant a jury in presuming a fact insisted on, the court is so far from being bound to instruct, that they are at liberty to presume it, that they would err in giving such instruction. By Washington, J., Bank *vs.* Corcoran, 2 Peters, 133.

FRANKLIN B. GOWEN,
JAMES E. GOWEN,
GEO. W. WOODWARD.

Supreme Court of the United States.

DECEMBER TERM, 1870. No. 362.

THE SCHUYLKILL AND DAUPHIN IMPROVEMENT AND RAILROAD COMPANY

vs.

MUNSON ET AL.

ADDITIONAL ARGUMENT FOR DEFENDANTS IN ERROR.

FRANKLIN B. GOWEN,
JAMES E. GOWEN,
GEO. W. WOODWARD,
For Defendants in Error.

The Leisenring Steam Printing House, 237 and 239 Dock Street, Philadelphia.

Supreme Court of the United States.

The Schuylkill and Dauphin Improvement and Railroad Company

vs.

Munson *et al.*

December Term, 1870.

No. 362.

Although the argument heretofore printed covers the only legal point properly presented to the court, the counsel for the defendants in error conceive it to be due to the court to submit the following, in answer to some of the statements made by the learned counsel for the plaintiffs in error.

It is stated by the learned counsel that the plaintiffs in error have been in peaceable and undisturbed possession of the land in controversy for thirty-five years, and have paid taxes on it for that period, and that, after the erection of valuable improvements by them, the defendants in error have asserted a stale claim as a mere speculation.

The answer to this is—

I. There is no evidence to support these allegations.

II. The plaintiffs in error have never had any actual possession of the land as against the defendants in error, except such as results from the fact that they were made defendants in ejectment to test the validity of the title.

III. The plaintiffs in error never paid any taxes upon the land prior to the year 1867.

IV. The defendants in error and those under whom they claim have been paying taxes upon the land for over twenty years.

V. The plaintiffs in error have never erected any improvements upon the land.

The defendants below claimed under a survey made by William Wheeler, on the 10th of July, 1794, upon a warrant dated July 1st, 1793; and at the trial the plaintiffs below produced evidence that a prior survey had been made by another deputy-surveyor, under the same warrant, in another locality, and had been returned and accepted. Under this state of facts, the law of Pennsylvania is clear, that the second survey, made without the authority of an order of the board of property, is absolutely void and of no effect.

But it is contended by one of the learned counsel for the plaintiffs in error that the first survey by Vanderslice—being made outside of his district—is void, under the sixth section of the act of April 3d, 1792. The other learned counsel admits that the survey is not void on account of having been made out of the district of the deputy-surveyor, but endeavors to show that it was void because it was (as he alleges) returned on the 3d of July, 1793, eight days before it purports to have been surveyed; and it is, therefore, argued, that if the first survey was void for any reason, the authority of the warrant was not exhausted, and the second survey would be good.

The answers to these several propositions are—

I. The sixth section of the act of 3d April, 1792, 3 Smith's Laws of Penna., 70, applies only to the districts embraced in the territory lying north and west of the rivers Ohio and Allegheny and the Conewango creek, and has no application whatever to the land in controversy, which is some 200 miles distant, and is embraced within the territory purchased from the Indians as early as 1749.

It is admitted, in the opinion of counsel published as a supplemental argument by plaintiffs in error, that the survey is not void for this reason, and the authorities are cited to show that the fifteenth section of the act of 1785, 2 Smith's Laws, 317, has no application to any lands except those then known as the new purchase, in the north-western portions of the State.

It has always been held that the third section of the act of 1781, 1 Smith's Laws, 529, which provides that a deputy-surveyor shall only make surveys in the county for which he is appointed, is merely directory. See Creek *et al. vs.* Moon, 7 S. & R., 330, and cases there cited.

The validity of a survey in any part of Pennsylvania not embraced within the new purchase, has never been questioned in the courts, on account of the deputy having gone beyond his district, without being affirmed; and some of the titles to the most valuable estates in the Commonwealth—among them the valuable coal lands devised by the late Stephen Girard to the city of Philadelphia—are held under surveys made out of the proper district of the deputy-surveyor.

II. The return of the first survey by Vanderslice was made upon the 16th and not upon the 3d of July, (see transcript of record, page 14,) and it therefore becomes unnecessary to reply to an argument which is based entirely upon premises which are unfounded.

III. The authorities already printed show that even an illegal survey, if made and returned, exhausts the power of the warrant.

In the supplemental opinion printed by plaintiffs in error, a reference is made to the fact that the survey of the Bonawitz tract was made before the date of the warrant, and it is suggested that such a survey would be void. This point was not made in the court below, nor was any instruction to the jury asked upon it; and it is submitted that it cannot now be made for the first time in a court of error; but, if made, the answer to it is—

I. That a survey is not void because made before the warrant came into the hand of the surveyor, provided he afterwards returned it as applicable to the warrant.

II. That the plaintiffs in error, having no title whatever under the Commonwealth, cannot object to any irregularity in the survey.

III. That after the lapse of twenty-one years there is a conclusive presumption of law that the survey was properly made; and no one except he, who claims under the Commonwealth by rights acquired within twenty-one years of the return of the survey, can object to its validity.

See the following authorities:—

It is true that, upon the first point suggested as an answer to the position of the plaintiffs in error, there are conflicting authorities.

The cases of McRhea *vs.* Plummer, 1 Binney, 227, and Mock *vs.* Astley, 13 S. & R., 382, sustain our position; while the case of Barton *vs.* Smith, 1 Rawle, 403, is to the contrary effect. It must be borne in mind, however, that in the latter case the rights of the party contesting the validity of the survey were acquired within thirteen years of its date.

For the purposes of this case, the original irregularity of the Bonawitz survey might be admitted; but this irregularity is cured after the lapse of twenty-one years, and the plaintiffs in error have no right to allege its existence.

After the lapse of twenty-one years, it is a conclusive presumption of law that the survey was actually made upon the ground.

See Caul *vs.* Spring, 2 Watts, 390; Norris *vs.* Hamilton, 7 Watts, 91; Neimand *vs.* Ward, 1 Watts & Sergeant, 68; Ormsby *vs.* Ihmson, 10 Casey, 462.